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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.B., a Person Coming Under the
Juvenile Court Law.

B215257
(Los Angeles County
Super. Ct. No. PJ36815)

THE PEOPLE,

Plaintiff and Respondent,

v.

E.B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Jack Gold, Commissioner. Affirmed in part and reversed in part.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and David C. Cook, Deputy Attorney General, for Plaintiff and Respondent.

E.B., a minor, was made a ward of the court based on a sustained petition for possessing a firearm, carrying a loaded firearm while being an active participant of a criminal street gang, and possession of live ammunition. He was found to have possessed the firearm and ammunition for the benefit of a criminal street gang within the meaning of Penal Code section 186.22.¹ On appeal, he challenges only the section 186.22 findings on the basis of insufficiency of the evidence. We agree with the minor and reverse those findings.

BACKGROUND

On December 1, 2008, a private security guard arrested the minor after seizing a loaded handgun and ammunition from the person of the minor. The minor stated he had the gun for his own personal protection from a rival gang that he had encountered. He admitted membership in the Pacoima Pierce Boys gang.

A Los Angeles Police Department gang expert opined based upon tattoos on the minor and the minor's admission during the booking process that the minor was a member of the Pacoima Pierce Boys gang. After testifying about criminal activities of the gang, the expert opined that the minor was carrying the gun for the benefit of the gang based on the following: the scene of the arrest was one of the main hangouts of the gang; visible tattoos on the minor's face; and "him carrying a gun, shows other gang members he is ready to point it for the gang."

DISCUSSION

The minor maintains that the evidence is insufficient to establish that he possessed the gun and ammunition for the benefit of the street gang. We agree.

In re Frank S. (2006) 141 Cal.App.4th 1192 (*Frank S.*) and *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) are instructive. In *Frank S.*, a minor was arrested for being in possession of a knife. He told the arresting officer that he needed the knife for protection against a gang. According to a gang expert, the minor was a member of a rival gang and his possession of the knife benefited his gang because "it helps provide

¹ All further statutory references are to the Penal Code.

them protection should they be assaulted.” (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1196.) The court held that this did not amount to substantial evidence that the minor possessed the knife with the specific intent to promote, further, or assist in any criminal conduct by gang members pursuant to section 186.22, subdivision (b).

In *Ramon*, the defendant was convicted of driving a stolen vehicle and possession of firearm violations and found to have committed the crimes for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b). A gang expert opined that the defendant’s driving a stolen vehicle in the company of another gang member with a firearm in the vehicle would benefit the defendant’s gang because they could commit crimes using the vehicle or the firearm and that the vehicle and firearm “were the tools the gang needed to commit other crimes to further the gang.” (*Ramon*, *supra*, 175 Cal.App.4th at p. 848.) In reversing the gang enhancement for a lack of substantial evidence, the court observed: “While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]” (*Id.* at p. 851.) The Fifth District noted that in its *Frank S.* opinion the minor was not in gang territory and accompanied by another gang member; that those facts present in *Ramon* were not adequate to warrant a different result from *Frank S.*

Ramon concluded: “Simply put, in order to sustain the People’s position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that. [Citations.]” (*Ramon*, *supra*, 175 Cal.App.4th at p. 853.) Similarly, here we cannot hold that a tattooed gang member arrested in gang territory for possession of a firearm and ammunition is acting to promote a criminal street gang.

We agree with our colleagues in the Fifth District and follow *Frank S.* and *Ramon* and conclude that the expert’s opinion here that the minor possessed the firearm and ammunition for the benefit of a gang is speculation, not substantial evidence. Accordingly, we reverse the section 186.22 enhancements.

DISPOSITION

The Penal Code section 186.22 findings are reversed. The order of wardship is otherwise affirmed.

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MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.